IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 949 OF 2005
IN
NOTICE OF MOTION NO.2474 OF 2005
IN
SUMMARY SUIT NO.681 OF 2003

Som Distilleries & Breweries Ltd. & Ors....Appellants
(Orig.Defendants)
V/s.
Esmail Ebrahim Dhariwal & Anr. ...Respondents
(Orig.Plaintiffs

Mr.Ravindra Srivastava with Mr.M.G. Vasudeo i/b. Rajesh Ravindra for Appellants.
Mr.Sanjay Jain i/b. Latif Jain & Co. for Respondents.

CORAM : H.L. GOKHALE AND
SMT.R.S. DALVI, JJ.

DATED : OCTOBER 26, 2005

P.C. :-

. Heard Mr.Srivastava with Mr.Vasudeo for the appellants. Mr.Jain appears for respondents.

2. The order under challenge in the present appeal is passed on Notice of Motion taken out by the defendants in a Summary Suit seeking to set aside the

Exparte Decree passed earlier on 13th February, 2004. The learned Single Judge who heard the Motion has made the Motion returnable by the impugned order. He has, however, declined to pass any ad-interim order. The learned Judge has recorded in the order that he had proposed to the Counsel appearing for the defendants to deposit Rs.1 Crore against the decretal amount of Rs.1.91 Crores (out of which Rs.30 lakhs are already deposited in a criminal case). The Counsel had expressed his inability to accept the said suggestion. The Judge has thereafter noted that under Order XXXVII Rule 4 of CPC, the defendants are required to make out a special case for setting aside the Exparte Decree and also that thereafter it is for the court to set it aside on such terms as it thinks reasonable. The suggestion given by the learned Judge having been not accepted, he has declined to pass ad-interim order. It is this order which is in appeal.

3. Mr.Srivastava, learned Counsel appearing for the appellants has submitted that the decree was passed against four defendants and first two defendants out of

them were the companies. He submitted that the Vakalatnama had been filed on their behalf and the parties were outstation parties. The Vakalatnama should not have been rejected under the technicalities which are raised by the office. We, however, find that the writ of summons was sent to the addresses of the defendants no.1 and 2 at their Bhopal addresses as well as their addresses at Mumbai. Defendants No.1 and 2 have been served at their Mumbai address on 22nd March, 2003 and clearly the Vakalatnama has been filed beyond ten days from this service. As far as defendants no.3 and 4 are concerned, it was submitted that it was not clear from the packets that an intimation was given to them and thereafter, the parties concerned have failed to collect the packets. The endorsement on the two packets reads as follows :- "Party concerned has not collected the packet inspite of giving intimation. Hence, returned." (as translated from original Hindi). The Counsel for the appellants submits that there should be three endorsements, first the date of intimation, secondly there should an endorsement that the party has not collected the packet after waiting for one week and

then there should be an endorsement of returning the packet to the sender. There is some merit in this submission. However, as far as defendants no.1 and 2 are concerned, the position is very clear that they had not filed their Vakalatnama within ten days from the date on which the writ of summons was served on them at their addresses at Mumbai.

4. The learned Counsel for the appellants submits that this is not the ground on which the Exparte Decree has been passed. It is always permissible for a successful defendant to maintain the order which is passed by the trial Court in appeal on grounds which are available to protect that order. This has been held in **Mahant Dhangir V/s. Madanmohan AIR 1988 SC 54**. In the circumstances, as far as original defendants no.1 and 2 are concerned, the Judge who passed the Exparte Decree was within his powers to pass the same in as much as the Vakalatnama was not filed within ten days.

5. Mr.Jain, learned Counsel appearing for the respondents pointed out that the affidavit filed by the

learned Advocate for the defendants stated that his name was not shown on board when the order came to be passed. As far as that aspect is concerned, he contradicted that affidavit by tendering the photocopy of the causelist which clearly showed the name of the Advocate. The Advocate did not remain present as well and therefore, Exparte Decree has been passed. The further submission of Mr.Jain is that the application for setting aside the Exparte Decree was a specific application, under Order XXXVII Rule 4 of CPC wherein the party concerned is expected to make twofold prayer that the Exparte Decree be set aside and leave to defend be granted. He relies upon the Judgment of the Apex Court in **Rajni Kumar V/s. Suresh Kumar Malhotra and Anr. reported in AIR 2003 SC 1322** where in para 10, the Apex Court has observed that where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. In the instant case, the defendant did not apply for leave to defend. The plaintiff could have made a grievance about the same. But in any case, the plaintiff is satisfied with respect to the terms that the learned Judge

expected from the defendants viz. that they had to deposit Rs.1 crore, in case, the exparte decree was to be set aside. The defendants having declined that offer, the learned Judge has refused to pass any interim order.

6. The claim of the plaintiff is Rs.1.90 Crores with interest from the date of filing of the suit. There are various grievances of the plaintiff against the defendant for which the defendant has his own defence. We do not propose to go into the merits of the matter. In the circumstances, we pass the following order :-

. Appeal is, therefore, dismissed.

7. After this order is passed, Mr.Srivastava, learned Counsel appearing for the appellants, on instructions and on reconsideration by the appellants, makes a submission that the appellants will deposit an amount of Rs.25 lakhs within one week, further Rs.36 lakhs in seven weeks thereafter and Rs.39 lakhs in eight

weeks thereafter. He, therefore, states that in four months, the amount of Rs.1 Crore will be deposited in the aforesaid manner and therefore, makes a request that the execution of the decree may be stayed on this count. Mr.Jain is not agreeable to any such modification and opposes this prayer.

8. We note that the learned Single Judge was inclined to set aside the Exparte Decree if an amount of Rs.1 Crore was deposited. Now in the aforesaid manner, the appellants are agreeable to deposit Rs.1 Crore in a phased manner. In the circumstances, we permit the appellants to deposit the amount as offered. If the amounts are so deposited, the execution of the decree will remain stayed. In the event of any default, it will be open to the plaintiff to proceed to execute the decree. In the event the Motion reaches hearing before the amount of Rs.1 Crore so deposited, it will be open to the parties, of course, to make their own submissions. In the event the Motion reaches after the amount of Rs.1 Crore is so deposited, the appellants will formally apply to the learned Judge to amend the

Motion and to add the prayer for leave to defend and which the learned Judge will consider on merits. The amounts are to be deposited with the Prothonotary &

Senior Master. If the amounts are so deposited, it will be open to the plaintiff to withdraw the same by giving a Bank Guarantee of a Nationalised Bank to be kept alive until the Motion is heard and disposed of.

(H.L. GOKHALE, J.)

(SMT.R.S. DALVI, J.)